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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 901

PAUL DE LUCIA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 15–20) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1966 (Pet. 21). The petition for a writ of certiorari was filed on December 23, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it is cruel and unusual punishment to deport an alien who, at the time he entered the United

States in 1920, under false documents and identity, was a convicted killer fleeing from Italy to escape prosecution for a second homicide; who had never been lawfully admitted to the United States; and whom the United States Public Health Service has found physically fit for deportation.

2. Whether there was any procedural infirmity in the consideration of petitioner's applications for discretionary relief.

3. Whether the designation of Italy as the place of petitioner's deportation was improper.

STATUTES AND REGULATIONS INVOLVED

The applicable statues and regulations are set forth in the petition for certiorari. We deem it appropriate, however, to set forth 8 C.F.R. § 242.17(c) in its entirety:

> (c) *Temporary withholding of deportation.* The special inquiry officer shall notify the respondent that if he is finally ordered deported his deportation will in the first instance be directed pursuant to section 243(a) of the Act to the country designated by him and shall afford the respondent an opportunity then and there to make such designation. The special inquiry officer shall then specify and state for the record the country, or countries in the alternate, to which respondent's deportation will be directed pursuant to section 243(a) of the Act if the country of his designation will not accept him into its territory, or fails to furnish timely notice of acceptance, or the respondent declines to designate a country. The respondent shall be advised that pursuant to section 243(h) of

the Act he may apply for temporary withholding of deportation to the country or countries specified by the special inquiry officer and may be granted not more than ten days in which to submit his application. The application shall consist of respondent's statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application and may present such pertinent evidence or information as he has readily available. The respondent has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion, or political opinion as claimed. The determination under section 243(h) of the Act may be based upon information not of record if, in the opinion of the special inquiry officer or the Board, the disclosure of such information would be prejudicial to the interests of the United States.

STATEMENT

Petitioner was born in Italy in 1897. In 1917 he was convicted of voluntary homicide in Italy (Exh. A–36, A–37).[1] After his release from prison he was alleged to have killed a second person.[2] Fleeing prosecution in Italy, petitioner came to the United States

[1] The administrative record was lodged with the clerk of the court of appeals and is now on file with the Clerk of this Court. The portion denoted "Certified Administrative Record" is cited herein "A.R.". In addition, the administrative record includes certain exhibits (filed separately), which we shall refer to by exhibit number.

[2] In 1924 he was convicted *in absentia* for this offense, but this conviction later was voided under Italian law by reason of lapse of time (Exh. A–38, A–73).

in 1920. He entered under a false passport, representing himself as Paolo Maglio, under which name he sought and obtained naturalization in 1928.

In 1943 petitioner was convicted of conspiracy to commit extortion in the movie industry and was sentenced to imprisonment for 10 years and fined $10,000 (see Exh. A–64 and A–65 and *United States* v. *Compagna,* 146 F. 2d 524 (C.A. 2), certiorari denied, 324 U.S. 867). After his release from jail in 1947, he remained on parole until 1954 (A.R. 496; Exh. A–94, pp. 2, 10). In 1957 he was indicted for income tax evasion, convicted, and sentenced to imprisonment for three years and fined $15,000. *United States* v. *De Lucia,* 262 F. 2d 610 (C.A. 7), certiorari denied, 359 U.S. 1000.

In 1956, after investigation had revealed petitioner's entry under a false name and his homicide conviction, denaturalization proceedings were instituted. They resulted in the revocation of his citizenship. *United States* v. *De Lucia,* 256 F. 2d 487 (C.A. 7), certiorari denied, 358 U.S. 836. Petitioner was subsequently ordered deported (to Italy) on the grounds that he had entered with fraudulent documents under an assumed name, and that he had been convicted of voluntary homicide prior to such entry (A.R. 287–290). The deportation order was upheld on judicial review. *De Lucia* v. *Flagg,* 297 F. 2d 58 (C.A. 7), certiorari denied, 369 U.S. 837.

The deportation order could not be executed between 1962 and 1964 because of inability to obtain a travel document for petitioner. However, in June 1964 a passport was issued by the Italian Govern-

ment and petitioner was notified to report for deportation on July 4, 1964 (A.R. 279). On July 1, 1964, he unsuccessfully moved to reopen the deportation proceeding (A.R. 278–285). He then brought a habeas corpus proceeding, which the district court dismissed. During the pendency of an appeal from that decision, the parties, with the approval of the court, entered into a stipulation for remand to the administrative authorities solely for the purpose of enabling petitioner to seek any discretionary relief to which he thought himself entitled and to have the special inquiry officer designate the country to which deportation would be effected.

The administrative proceedings were reopened for this purpose (A.R. 263–276). Petitioner applied for two forms of relief. The first was for the so-called "registry" under Section 249 of the Immigration and Nationality Act, 8 U.S.C. 1259, which would have erased his deportability and granted him permanent residence upon his establishing good moral character and worthiness for discretionary relief. The second was for withholding of deportation under Section 243(h) of the Immigration Act, 8 U.S.C. 1253(h), on the ground that he would be subject to persecution if deported to Italy.

Extensive hearings were conducted in which petitioner presented evidence by himself and several witnesses, as well as numerous documents (A.R. 344–726; Exh. A–68 to A–133). However, he produced no witnesses to endorse his reputation or to support his claim of good character. He testified that he had not been engaged in any occupation or employment

for many years, and that his income had been derived almost entirely from an item labeled on his income tax returns as "miscellaneous income", which consisted of winnings from gambling at race tracks (A.R. 420–421, 488; see, also, Exh. A–94). His income from this source was said to be approximately eighty to ninety-two thousand dollars annually (A.R. 450, 454–461).

When pressed on cross-examination concerning his present activities, his sources of income, and his past history, petitioner (without asserting any claims of privilege) refused to answer questions or to produce detailed supporting data, although the special inquiry officer in each instance directed him to answer and to produce such materials. Among the inquiries to which he refused to respond were the following:

1. A current net worth statement (A.R. 680).

2. A listing of his 1964 race track bets, information concededly in his possession (A.R. 651, 680, 710).

3. The 1964 race track programs showing bets and winnings, also concededly in his possession (A.R. 680, 710).

4. The donor of a $500 gift to him (A.R. 468–470).

5. The "friends" who gave money to his wife while he was in jail 1959–1961, and the amount and nature of such payments (A.R. 627, 633, 637).

6. His date and place of birth, parents, criminal record in Italy and the United States, various names he has used, his employments, circumstances of his flight from Italy and fraud-

ulent entry into the United States, and fraud in obtaining naturalization (A.R. 585, 586, 590, 595, 599–621).

7. Whether he had ever engaged in bootlegging or extortion; whether he had been a member of a group engaged in illegal activities; whether he had received any payments from such a group or from such activities (A.R. 621–623).

8. Where he had obtained $102,000 to pay a settlement of his income tax liability in 1962 and $100,000 or $125,000 to settle an earlier income tax liability in 1943 (A.R. 648, 653–654).

9. Whether he had sources of income not revealed on his income tax return for 1964; whether he had additional assets (A.R. 654–656).

After conclusion of the reopened hearings, the special inquiry officer on October 25, 1965, denied the applications for discretionary relief and reinstated the deportation order, directing petitioner's deportation to England, the country designated by him, and alternatively to Italy, if England was unwilling to accept him. The special inquiry officer found that petitioner had not demonstrated his worthiness for the relief of registry in view of his extensive record of criminality and fraud, including a recent conviction for income tax evasion; his refusal to answer questions bearing on his eligibility and worthiness for relief, even though directed to do so; and the false testimony he had given in support of his application.[3] The application to withhold deportation because

[3] A prosecution of petitioner for alleged perjury in these proceedings is pending, with the trial set to begin in February 1967.

of anticipated persecution in Italy was rejected as unsubstantiated.

Petitioner then appealed to the Board of Immigration Appeals, which on April 21, 1966, affirmed the decision of the special inquiry officer and dismissed the appeal (Pet. 31–55). The Board denied the application for registry in the exercise of its discretion (Pet. 45–46). In making this determination the Board took into account petitioner's age, long residence, physical condition, and family ties (Pet. 53), but found these factors outweighed by his extensive record of criminality and fraud, by the absence of any substantial indication of rehabilitation, and by the refusal to answer questions concerning his income and activities (Pet. 54–55).

Following the refusal of England to permit his entry as a deportee, petitioner was again notified to report for deportation to Italy (Pet. 26–28). However, on April 22, 1966, he filed another petition for judicial review of the deportation order (which automatically stayed its execution), contending that the deportation order violated the Eighth Amendment and charging various procedural irregularities (Pet. 22–25). On November 17, 1966, the United States Court of Appeals for the Seventh Circuit affirmed the Board's decision and again upheld the deportation order (Pet. 15–20). The court found the denial of discretionary relief clearly warranted by the record and rejected each of petitioner's claims of procedural irregularity.

ARGUMENT

1. The contention that the deportation order subjects petitioner to cruel and unusual punishment is not open in this proceeding. Petitioner had full opportunity to challenge the deportation order in a previous review proceeding, in which that order was upheld by the court of appeals and certiorari was denied by this Court. The six-month period for review of that order has, of course, long since expired. Section 106 (a)(1) and (c) Immigration and Nationality Act, as amended, 8 U.S.C. 1105a (a)(1) and (c); *Lopez* v. *Immigration and Naturalization Service,* 356 F. 2d 986, (C.A. 3), certiorari denied, 385 U.S. 839. At all events, the constitutional challenge is without merit. While deportation is unquestionably a severe consequence, it has never been regarded as punishment—let alone cruel and unusual punishment—in the constitutional sense. That has been the view taken by this Court in an unbroken line of decisions extending from *Fong Yue Ting* v. *United States,* 149 U.S. 698, 730, to *Mulcahey* v. *Catalanotte,* 353 U.S. 692. The principle was thoroughly reexamined and reaffirmed in *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 594–595, and *Galvan* v. *Press,* 347 U.S. 522, 529–532—decisions that upheld the propriety of deportation proceedings against aliens who—unlike petitioner—entered this country lawfully, thereafter engaging in conduct giving rise to deportability. The present case is thus *a fortiori.*[4]

[4] Petitioner's citation of *Wolf* v. *Boyd,* 287 F. 2d 520 (C.A. 9), ignores the many other decisions in which similar constitutional challenges have been rejected. *Wolf* involved deporta-

We point out that petitioner was 23 years old when he entered the United States illegally, had already served time as a convicted killer, and was fleeing prosecution for a second homicide. Of his years in the United States, eleven have been spent in fighting denaturalization and deportation, and thirteen have been spent in jail or on probation. He professes not

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tion for misconduct in the United States to a country in which the alien had never lived, which of course is not the case here. While the court of appeals found the issue substantial enough to warrant convening a three-judge court, the case thereafter became moot when the deportation order was withdrawn by the administrative authorities. The issue was thus never resolved on the merits. In like circumstances, another court rejected a plea for a three-judge court, finding insubstantial a claim that cruel and unusual punishment was imposed by deportation of a long time resident for misconduct in the United States. *Marcello* v. *Kennedy*, 194 F. Supp. 748 (D.D.C.), vacated and remanded on other grounds, 312 F. 2d 874 (C.A.D.C.), certiorari denied, 373 U.S. 933. Other lower court decisions explicitly rejecting a contention that deportation visits cruel and unusual punishment include *Burr* v. *Immigration and Naturalization Service*, 350 F. 2d 87 (C.A. 9), certiorari denied, 383 U.S. 915; *MacKay* v. *Turner*, 283 F. 2d 728 (C.A. 9), certiorari denied, 364 U.S. 888; *United States ex rel. Circella* v. *Sahli*, 216 F. 2d 33 (C.A. 7), stay denied *sub nom. Niukkanen* v. *Turner*, 348 U.S. 964. Petitioner is mistaken in stating (Pet. 10) that this Court has never specifically considered the application of the Eighth Amendment in deportation cases. *Fong Yue Ting*, *supra*, expressly rejected the claim that deportation is cruel and unusual punishment within the meaning of the Eighth Amendment. And *Carlson* v. *Landon*, 342 U.S. 524, rejected a claim that the bail provision of the Amendment was applicable to deportation cases. The expatriation cases cited by petitioner held only that expatriation for evading military service and for desertion was an improper measure where it had been imposed as punishment for specified criminal conduct. There is no punitive aspect here. Deportation for improper entry is manifestly a proper regulatory measure. See *Wong Wing* v. *United States*, 163 U.S. 228.

to have been gainfully employed for many years. His physical condition is not that of a young man, but he has been examined by a Public Health Service doctor, who found no physical impediment to deportation (see A.R. 578–579). He has lived with some of his asserted ailments for many years, including periods spent in jail. He is obviously a man of means, and there is no reason why he could not obtain any necessary medical treatment in Italy. While he has close family ties in this country, he also has family ties in Italy. In the circumstances, there is, we submit, no basis for the claim that cruel and unusual punishment is being imposed.

2. The parties stipulated for remand of the case in 1964 solely to enable petitioner to present applications for discretionary relief and to have the place of deportation fixed by a special inquiry officer (A.R. 274–275). The burden was upon petitioner to establish his eligibility for relief and his worthiness for the exercise of discretion. 8 C.F.R. 242.17(d); *Kimm* v. *Rosenberg*, 363 U.S. 405. The Board found that, in applying for the discretionary relief of registry, petitioner had testified untruthfully in some respects and had refused to answer many relevant questions concerning his activities and income, and hence—particularly in the light of his long record of criminality and fraud—that he had not proved his case for discretionary relief. Petitioner was also found to have failed to establish his claim that persecution would result if he were deported to Italy. His voluminous depositions and exhibits showed only that if he were to engage in illegal activities in Italy he would be subject to restric-

tive measures imposed by a court (see Pet. 46–50)—hardly the "persecution on account of race, religion or political opinion" with which Section 243(h) of the Act, 8 U.S.C. 1253(h), deals. In this Court, petitioner does not challenge the merits of the denial of discretionary relief, and his precedural contentions are, we submit, without merit.

a. Petitioner was not denied compulsory process, the right of confrontation, or the right to cross-examine (Pet. 13). He is mistaken in contending that, because applications for discretionary relief are considered during the deportation hearing, they are governed by the same procedural requirements applicable to a determination of deportability. This Court expressly recognized in *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217, 230, n. 16, that the consideration of such applications during the deportation hearing is a matter of convenience designed to avoid multiple litigation, and that "denial of suspension of deportation as a discretionary matter is reviewable only for arbitrariness and abuse of discretion, and thus could hardly be within the procedural and evidentiary requisites" (*id.* at 228, n. 15) applicable to the finding of deportability.

(1) The claim to an absolute right of compulsory process in the consideration of such a discretionary application is unwarranted by any statute, regulation or precedent. The court below rightly regarded this as a matter within the discretion of the special inquiry officer (Pet. 18). As the petition itself indicates (Pet. 8), petitioner sought to subpoena various federal, State, and foreign officials. The special in-

quiry officer found that such subpoenas were inappropriate and would result only in harassment and confusion. We point out the considerable assistance afforded petitioner in his efforts to support his applications. He was granted the unusual privilege of taking the deposition of a witness in Italy (Exh. 102). The government also searched unsuccessfully for an alleged petition by deportees in Italy (A.R. 576, 579–80) and offered to produce official records of the Public Health Service (A.R. 579–80). A subpoena for production of information concerning bond purchases was withdrawn upon the government's assurance that it would produce any available information (A.R. 702–704).

(2) The claim of improper denial of confrontation and cross-examination apparently refers (Pet. 9) to petitioner's request to cross-examine officials of the Italian Government concerning an official communication (Exh. A–134) allegedly pertinent to the contention that deportees in his situation would be persecuted in Italy. But it was petitioner himself who had requested the communication (A.R. 580)—which largely confirmed other information already given by petitioner's own witnesses (see Exh. A–102, A–105). The communication had obvious relevance to the consideration of a plea of anticipated persecution and was, therefore, properly received. *United States ex rel. Dolenz* v. *Shaughnessy*, 206 F. 2d 392, 395 (C.A. 2); *Namkung* v. *Boyd*, 226 F. 2d 385, 388 (C.A. 9); *Diminich* v. *Esperdy*, 299 F. 2d 244, 248 (C.A. 2), certiorari denied, 369 U.S. 844.

b. Petitioner's claim of prejudgment is without merit. Similar claims have never been substantiated. *United States ex rel. Accardi* v. *Shaughnessy,* 347 U.S. 260; *Shaughnessy* v. *United States ex rel. Accardi,* 349 U.S. 280; *Marcello* v. *Bonds,* 349 U.S. 302.[5] Petitioner's evidence of prejudgment consisted primarily of public statements of former Attorneys General announcing a determination to proceed vigorously against a group of unnamed racketeers. Many of these were the very statements found deficient by this Court in the second *Accardi* case and in *Marcello* to show prejudgment. As in second *Accardi,* completely lacking in this record is any showing that the special inquiry officer or the Board was under an express or implied direction to decide the case against petitioner, or that they otherwise prejudged his applications. The record, on the contrary, shows that the Attorney General had issued specific instructions directing officials deciding immigration cases to use their own independent judgment (Exh. A–71). Furthermore, the specal inquiry officer—without contradiction by petitioner at any stage of the administrative or judicial proceedings—stated at the hearing and in his decision that he had received no

[5] In the *Bufalino* case cited by petitioner (Pet. 13) there was a motion for reconsideration followed by a stipulation of the parties remanding the case so that new applications for discretionary relief could be presented and considered. The new applications were denied after extensive hearings and new claims of prejudgment were unsuccessful. The court of appeals has just rejected, on jurisdictional grounds, a challenge to the new administrative order. *Bufalino* v. *Attorney General,* C.A.D.C., No. 20, 161; decided December 6, 1966.

instructions or directions from anyone[6] and had not prejudged the case or considered adverse publicity from any source (A.R. 143–144). Finally, at no time during the proceedings did petitioner claim that the Board of Immigration Appeals itself had prejudged his claim. As this Court noted in its recent decision in *Woodby* v. *Immigration and Naturalization Service*, No. 40, this Term (C.A. 6), Slip op., n. 2, decided December 12, 1966, the Board is not bound by the special inquiry officer's decision, but makes its own independent determination on issues of law and fact and on the exercise of discretion.[7]

3. Petitioner's objections to the execution of the deportation order are also without merit.

a. The assertion (Pet. 11) that the government "deliberately misrepresented" to England that petitioner was a citizen of Italy is unfounded, particularly since he concededly was born in Italy and Italy had issued a passport for him. Ultimately, of course, Italy will decide whether he is a citizen of that country, if and when the execution of the deportation order again becomes imminent and an application to reinstate the passport is made.

b. We agree that acceptance of a deportee by the country of destination is a prerequisite to deportation but

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[6] We point out that the public statements to which petitioner refers were made by Attorneys General and a Commissioner who have long been out of office. No such prejudicial statements were, or could be, attributed to Attorney General Katzenbach or Commissioner Farrell, who were in office throughout these administrative proceedings.

[7] Nor was petitioner precluded from raising the issue of prejudgment with the Board. In both *Accardi* and *Marcello* Board prejudgment was unsuccessfully urged to the courts. Equally, petitioner here could have made such a challenge before the Board itself.

not that such acceptance must be procured before deportation to that country is reasonably definite and imminent. There would be no point in soliciting such an acceptance so soon—the deportation order might not become final for several years and deportation might be nullified by administrative or judicial review, by the grant of discretionary relief, by the enactment of new legislation, or by the deportee's acceptance in a country designated by him. Therefore, under current practice, the special inquiry officer in his order designates the alternative places of deportation only provisionally. 8 C.F.R. 242.17(c), 242.18(c). The inquiries to the countries designated by the alien or specified alternatively by the special inquiry officer are ordinarily not made until the deportation order is final. See Gordon and Rosenfield, *Immigration Law and Procedure* (1966 Rev.), §§ 5.17, 5.18.

In the present case there was an acceptance by Italy, in the form of a passport that had been issued in 1964 and was valid and outstanding at the time this proceeding for judicial review was brought. The bringing of the review proceedings in effect suspended the finality of the deportation order, and Italy suspended the validity of the passport (Pet. 9). If and when the deportation order once more becomes final, the government will again inquire, as the law requires, whether Italy will agree to accept petitioner as a deportee. Under current regulations, if the answer is affirmative, petitioner will be informed of such acceptance and will receive at least 72 hours' notice to report for deportation. 8 C.F.R. 243.3.

c. Petitioner's claim that his plea for a stay of deportation for medical reasons was not adequately considered is unsupported by the facts. He made a similar plea in 1964, which was denied after he was examined by a United States Public Health Service doctor (A.R. 285, 578–79); the testimony of his own physician cannot thus be accurately characterized as "without contradiction" (Pet. 2). His 1966 application for a stay on the same grounds and on similar allegations (Pet. 29)—unaccompanied by any new evidence—presented no basis for favorable action. The submission of alleged supporting medical data a month after the application was denied and after this litigation was well under way (Pet. 14) likewise furnishes no basis, we submit, for upsetting the denial of the application for a stay.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967